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No. 80-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

v.

THE UNITED STATES OF AMERICA *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS JOHN W. MARTIN *ET AL.* IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's finding that the Personnel Board of Jefferson County, Alabama, had not met its burden, under Title VII of the Civil Rights Act of 1964, of showing that the employment tests at issue reliably predicted job performance of applicants for jobs of police officer and firefighter.

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BRIEF FOR RESPONDENTS JOHN W. MARTIN *ET AL.* IN OPPOSITION

Respondents John W. Martin *et al.* submit this brief in opposition to the petition for a writ of certiorari filed by The Personnel Board of Jefferson County, Alabama.[1]

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[1] Respondents John W. Martin *et al.* have also, pursuant to Supreme Court Rule 19.5, filed a cross-petition for a writ of certiorari raising the question whether the courts below improperly narrowed the relief granted to respondents.

STATEMENT

The Personnel Board of Jefferson County ("petitioner" or "Board") recruits, screens, and certifies eligible candidates for employment by 12 municipalities and other public agencies, some of whom were defendants below. From December 20 through December 22, 1976, the district court tried the issue of whether petitioner's use of two standardized employment tests violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The tests involved are the 10-C examination, used to screen and rank applicants for police officers' positions, and the 20-B examination, used to screen and rank applicants for firefighters' positions. The district court held that petitioner's use of both tests violated Title VII (A. 28-55). It enjoined the Board from making further use of these tests and prescribed goals and timetables to remedy the Board's prior unlawful uses of the tests (A. 64-65). The court of appeals affirmed in respects pertinent here (A. 4-5).

A. Adverse Impact

The district court found that the tests "have had an adverse impact on blacks" as shown by "substantial differences in hire rates and pass rates" for black applicants as opposed to white applicants (A. 33). It found that only 48.6 percent of black applicants passed the 10-C examination, while 90.2 percent of white applicants passed the examination; and that only 24.2 percent of the black applicants passed the 20-B examination, while 85.2 percent of the whites passed the examination (A. 33).

The district court also found that the impact of the test was increased because the Board used the test not only to pass and fail candidates, but also to rank passing candidates for selection on eligibility lists (A. 33, 59). Of the blacks who did pass the tests, 85.4 percent were

placed in the lower half of the police officers' eligibility list, and 89.9 percent were placed in the lower half of the firefighters' eligibility list (A. 33). The district court found that such disproportionately low rankings of black candidates posed an additional barrier to their employment since "in a very real sense, 'passing' an exam is measured not by obtaining a derived score of 70 (and thereby being entered on the eligibility list) but by obtaining a score sufficiently high to be placed on the eligibility list at a position" high enough to result in hiring before the eligibility list expired (A. 59).

In all, the district court found that only 6.6 percent of the black applicants who took the 10-C examination were ultimately hired as police officers, as compared to a 23.3 percent hiring rate for white applicants (A. 32). Of the black applicants who took the 20-B examination, only 3.2 percent were ultimately hired as firefighters, as compared to the 14.1 percent of white applicants thus hired (A. 32).

B. Job-Relatedness

Petitioner attempted to show that the applicants' test scores predicted their job performance through the so-called "criterion" method of test validation, which involves correlating test scores with criteria that must be "important or critical work behaviors or work outcomes." [2]

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[2] See Department of Justice Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 (1976) at § 12b(3), (A. 151), hereafter cited as "Justice Department Guidelines." These guidelines were applicable to the action below since one of the consolidated cases was brought by the Justice Department. Following the trial, the Justice Department, along with other agencies concerned with employment discrimination, joined in promulgating the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979), hereafter cited as "Uniform Guidelines" (A. 76-137). The Uniform Guidelines also require that all criteria used in criterion validity studies be "important or critical work behaviors or work out-comes." § 1607.14B(3), A. 101. Accepted

The Board primarily relied on two criteria in this regard: the class ranking of applicants upon graduation from the police and fire academies and their performance on the job as measured by an experimental job rating criterion. (A. 38-40.)[3]

1. *Academy Class Rankings.* The district court concluded that the necessary relationship between test scores and job performance would be established if the tests could predict who would pass and who would fail the academies (A. 38). The court found, however, that the tests could not make such predictions. The court cited evidence showing that

> —the required passing grade for the police officers' examination had been lowered several times, but there was no indication that lowering the score resulted in more candidates failing the training program (A. 46);
>
> —no one ever failed the firefighters' training program (A. 46); and
>
> —if one used available statistical methods to project the academy grades of those scoring below the cutoff points on the examinations, the projection would show that test scores of zero on the examinations would still predict passing averages at the academies (A. 46).

The district court also concluded that correlation of the test scores with academy rankings would be an ac-

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professional standards also require such a showing. *Standards For Educational and Psychological Tests* (published in 1974 by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education), at 34.

[3] The Board also attempted validation studies using the departments' efficiency ratings of policemen and firemen as a criterion, but the Board's own expert witnesses acknowledged that these ratings were not sufficiently reliable to be an acceptable criteria (A. 39).

ceptable validation if the academy rankings were shown, in turn, "to be themselves appropriate predictors of job performance" (A. 38). While the court found that the evidence showed a statistically significant correlation between test scores and academy grades, it also found that the academy grades did not themselves predict job performance because the Board's studies show

> "that for the most part the correlation between academy grades and measures of job performance are not significant and, in the few instances where significant correlations are found, the findings are mixed—*some being positive and others being negative. A negative correlation, of course, indicates that the higher the academy grades, the lower the performance ratings tend to be.*" (A. 45; emphasis added.)

Thus, the district court found the test scores did not meaningfully predict who would pass and who would fail the academies, and that, although there was some correlation between test scores and academy grades, there was no meaningful correlation between academy grades and job performance. Hence, the district court ruled that the evidence concerning the test scores did not establish that they predicted performance on the job as required by Title VII. The court of appeals explicitly affirmed these findings (A. 21-22).

2. *Experimental Job Performance Rating.* Turning to the evidence concerning the relationship of test scores with the experimental job performance ratings,[4] the district court found that there was no statistically significant correlation between the scores on the firefighter test

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[4] The experimental job performance ratings were developed for use in the validation studies and consist of 12 rating categories relating to personality characteristics, job knowledge, and abilities. In-service employees were rated by their supervisors on each of these 12 criteria (A. 39-40).

and the job performance ratings (A. 46). Indeed, there was a *statistically significant negative correlation* between test scores and job performance ratings for firemen with more than three years experience, "suggesting that over time the lower scoring applicants made the better employees" (A. 47). As to the police officer test, the district court found that a statistically significant correlation, albeit a rather weak one, existed between the test scores and job performance ratings (A. 47).

The district court then considered whether the correlation between police officer scores and job performance ratings was "appropriate for operational use" by the employer, as required by the Justice Department Guidelines, § 12b(5), (A. 152).[5] The district court considered this question from a number of statistical and practical perspectives (see A. 45-55). It found, *inter alia*, that the observed correlation was so small that a large difference in test scores would predict only a very small increase in job performance ratings and that the correlation could not even tell the Board whether the highest-scoring applicant would likely obtain a "higher experimental rating than the lowest-scoring applicant" (A. 51). In light of "the minimal benefits resulting from the 10-C [police officer examination] in the context of this employment situation," the court concluded that "no-test-at-all has 'substantially' the same practical validity as the 10-C" (A. 54).

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[5] The Uniform Guidelines, § 1607.14B(6), A. 103, contain the same requirement that an employer show not merely that the relationship between test results and a job criterion is statistically significant, *i.e.*, not likely to be the result of pure chance, but also that it is sufficiently powerful to be "appropriate for operational use" considering, *inter alia*, the magnitude of the statistical relationship, the size of the sample, the value of the criterion used, the degree of adverse impact of the test upon minorities, and the availability of other selection measures.

The court of appeals explicitly affirmed the district court's findings respecting the utility of the test, noting that they were "reached after careful and comprehensive consideration of all the facts and circumstances" (A. 14).

C. *Washington* v. *Davis*

In addition to its review of the evidence supporting the district court's findings, the court of appeals considered petitioner's argument that *Washington* v. *Davis*, 426 U.S. 229 (1976), required reversal. It assumed, without deciding, that *Washington* applied even though that decision rested on the Equal Protection Clause and statutes other than Title VII (A. 16 n. 18). The court of appeals concluded that the test usage sustained in *Washington* was materially different from the test usage condemned by the district court. In *Washington*, the employer had used its test to determine whether a candidate had the minimum reading and verbal skills to complete a job relevant training program. Here, by contrast, the test scores were not used to determine minimal competence to complete a training program and, indeed, did not predict successful completion of the training program (A. 16 & n. 23). Instead, petitioner used the test scores to rank candidates for job selection—*i.e.*, to place candidates on a spectrum ranging from most fit to least fit for the job (A. 16 & n. 23; A. 21).

SUMMARY OF ARGUMENT

Petitioner argues that *Washington* v. *Davis* requires courts to sustain any employment test that predicts class rank in a training program even if the evidence shows that the class rankings have no relationship to job performance. *Washington* v. *Davis* does not support that proposition. There, the test was used simply to screen out applicants who could not read and write well enough to complete the required training program. Here, the

tests were shown to be unable to perform that function. The fact that petitioner's tests nonetheless predicted relative academy rankings does not show that the tests are job-related, because, as both lower courts found from the evidence in this case, there is no relationship between class rank and job performance.

The district court did not, as the petitioner suggests, balance the adverse racial impact of the police officers' examination against its ability to predict job performance, but rather ruled that it had, for practical purposes, no ability to predict job performance. The opinion of the court of appeals further shows that the last question raised by petitioner is not present in the record. In any event, it is proper under Title VII to take into account the adverse racial impact of a selection device when considering if it is appropriate for use by an employer.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH *WASHINGTON* v. *DAVIS*.

Petitioner's argument that the decision below conflicts with this Court's decision in *Washington* v. *Davis* overlooks important factual differences between the two cases that the court below correctly considered dispositive.[6] It

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[6] Petitioner presents—but does not argue—the question whether the ruling in *Washington* applies in a Title VII case (Pet. (i)). Petitioner urged the applicability of *Washington* below and effectively prevailed on that issue when the court of appeals agreed to assume its applicability *arguendo*. Petitioner does not now argue that the court of appeals erred in applying the standards of *Washington*. Rather, it merely "suggests" that the Court "may want to address" this "additional issue" should it grant certiorari with respect to any issue both raised *and* argued by petitioner (Pet. 9 n.18). Having prevailed on the issue below, petitioner should not now be heard to raise it as a ground for review of the court of appeals' decision. See *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939).

is true that both *Washington* and the present case involve challenges to tests that correlate with performance at training academies. But the differences between the usage made of the tests in the two cases are more important than that superficial similarity, as we now show.

As the court of appeals below pointed out, the test in *Washington* was used to predict (and did predict) which applicants possessed the minimum skills necessary to pass the training academy. See 426 U.S. at 250. It thus screened out persons with insufficient skills to complete training that all conceded was relevant to job performance. *Id.*; see *id.* at 251 n. 17. Moreover, all applicants who passed the test were admitted to the academy (provided that they also met certain character and physical fitness standards). *Davis* v. *Washington*, 348 F. Supp. 15, 16 (D.D.C. 1972). Thus, the decision in *Washington* that the test there at issue was job-related simply represented an application of the common sense principle that an employer may reasonably require that its job applicants read and write well enough to complete a required training program.

Here, by contrast, the tests are not used to predict, and do not predict, which applicants have the minimal skills needed to complete academy training, since statistical projections show that even an applicant who scores zero on the test will pass the academy. Thus, unlike the situation in *Washington*, the tests in this case cannot be characterized—or, justified—as a simple device to screen out those recruits whose reading and writing skills were not sufficient to allow them to complete the required training.

The tests at issue here evidently predict who will make high scores at the training academies, and petitioner argues that they must therefore be upheld as job-related

under *Washington*. In this case, the courts below found, however, that there is no correlation between academy grades and subsequent job performance, and ruled that a test that predicts academy grades that in turn have no relationship to job performance cannot be said to be job-related. Petitioner suggests that the absence of any relationship between grades and job performance is irrelevant under *Washington*, which in petitioner's view held that *any* "positive relationship between performance on [a test] and in [an academy] was sufficient to validate" the test, regardless of the relationship (or lack thereof) between academy performance and job performance. Pet. 11.

That is a misreading of *Washington*, as the court of appeals observed. In *Washington* this Court found it unnecessary, in upholding the test at issue, to determine whether academy performance predicted job performance. But the relationship between academy and job performance was irrelevant for reasons that do not exist here. The test in *Washington* excluded those who would fail the academy. All who passed the test were admitted to the academy, where they received training essential to the job. Relative performance at the academy in those circumstances was unimportant; it was enough to know, to demonstrate that the test was job-related, that the academy training was essential to the job and that those who failed the screening test would not successfully complete the academy course.

In upholding the test, then, this Court did not say that the relationship between relative academy performance and job performance would never be relevant; it held only that it was not necessary to inquire into that relationship when the test in the first instance was shown to exclude those who could not make it through the academy. In the instant case, the tests do not perform

that screening function: one who fails the test would in all likelihood nevertheless pass the academy. Thus the courts below considered evidence regarding the relationship between academy grades—which the tests can predict—and job performance. When it turned out that academy grades bore no relationship to job performance,[7] the courts below correctly held that petitioner had failed to demonstrate that the tests were job-related under Title VII and enjoined petitioner from using the test scores to determine who would be eligible for employment.

That ruling was correct because Title VII forbids the use of selection devices that disadvantage minorities unless the use of those devices is justified by some "business necessity." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). If a test is shown only to predict relative grades in training, but those grades in training are in turn shown to have no relation to performance on the job, it cannot be said that any "business necessity" permits use of the selection test since, without use of the test, the employer would still achieve the same level of job performance from his work force. This requirement that training grades be themselves shown to predict job performance is simply an application of the general rule, grounded in *Griggs* and contained in all of the guidelines interpreting Title VII, that when an employer seeks to validate employment examinations he must show that the criterion with which he compares test scores itself represents "important or critical work behaviors or work outcomes." See note 2 above. These guidelines "are 'en-

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[7] Petitioner cites testimony rather than findings below and suggests that there is a relationship between academy grades and job performance. Pet. 8. That suggestion raises a factual issue that was twice resolved against petitioner by the courts below (A. 21-22, 45) and that does not warrant further review by this Court. *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

titled to great deference'" in construing Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975), *quoting Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 433-34.[8]

The manner in which the Board uses the examinations provides a further reason why *Washington* v. *Davis* is inapplicable to this case. As the court of appeals noted, unlike the situation in *Washington* v. *Davis*, all applicants who pass the test examination are not automatically admitted to the police or fire academies. Rather,

> "[o]nly those at the top of the eligibility list, those with the highest test scores, are certified for job placement. Even those who score a passing grade,

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[8] The Uniform Guidelines now specifically require that, when an employer seeks to validate a test using rankings in training as a criterion, relative success in the training program must itself be validated as a measure of job performance. § 1607.14B(3), A. 101-02. Petitioner cites no court of appeals decision which, in conflict with the decision below, rejects this requirement. To the contrary, numerous decisions of the lower courts have required that attempts to validate police officers' and firefighters' examinations against academy rankings must show a substantial relationship between the rankings and job performance. *E.g.*, *Guardians Association of N.Y. City* v. *Civil Service Commission*, 431 F. Supp. 526, 546-47 (S.D.N.Y.), *vacated on other grounds*, 562 F.2d 38 (2d Cir. 1977); *Dozier* v. *Chupka*, 395 F. Supp. 836, 853 (S.D. Ohio 1975); *United States* v. *City of Chicago*, 385 F. Supp. 543, 556 (N.D. Ill. 1974), *aff'd on other grounds*, 549 F.2d 415 (7th Cir. 1977); *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131, 1148-49 (N.D. Ohio 1973), *rev'd on other grounds*, 520 F.2d 492 (6th Cir.), *cert. denied*, 426 U.S. 934 (1976); *Harper* v. *Mayor and City Council*, 359 F. Supp. 1187, 1202-03 (D. Md.), *modified and aff'd*, 486 F.2d 1134 (4th Cir. 1973); *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084, 1090 (E.D. Pa. 1972), *aff'd in pertinent part*, 473 F.2d 1029 (3d Cir. 1973). *See Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1382 n.17 (9th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3698 (1980); *Vulcan Society of N.Y. City Fire Dept., Inc.* v. *Civil Service Commission*, 490 F.2d 387, 396-97 (2d Cir. 1973).

> and are deemed by the Personnel Board to possess the capacity to complete training, are not hired unless they are among the highest scorers." (A. 21.)

Thus, petitioner's use of the tests for ranking purposes poses an additional barrier to minority employment not found in *Washington* v. *Davis*.

In short, the Board's use of tests is significantly different from the use approved in *Washington*. In that case, the test performed the modest, but critical, task of identifying those candidates who cannot read or write well enough to pass a job training program. The Board's tests, on the other hand, cannot and do not identify those who will fail job training. The Board uses its tests to predict who will be the best students at the academies even though the record shows that there is no relationship between the job performance and the grades of those persons who complete the training programs. *Washington* v. *Davis* does not hold that an employer may use employment tests that have a substantial racial impact solely because the tests predict class standing which has no relationship to performance on the job.

II. THE BOARD'S ARGUMENT THAT THE DISTRICT COURT ERRED IN BALANCING THE RACIAL IMPACT OF THE POLICE OFFICERS' TEST AGAINST ITS VALIDITY DOES NOT WARRANT REVIEW.

A. The District Court Did Not "Balance" The Racial Impact Of The Test Against Its Validity.

The district court found that a weak correlation existed between applicants' scores on the 10-C examination and their ratings on the experimental job performance criterion. Pp. 5-7, *supra*. It then inquired whether this correlation indicated that the examination had any practical utility to the employer. Virtually all of the

court's analysis of this question, which occupied some seven pages (A. 47-54), dealt with techniques used to determine precisely what a correlation of this magnitude would and would not tell the employer. The district court found that, *inter alia*, the test would not even tell the employer that the recruit with the highest examination score would make a better police officer than the recruit with the lowest test score. See p. 6 above. After this extensive analysis, the court in passing mentioned the racial impact of the test.

> "The DOJ Guidelines § 12(b), provide that, in determining operational appropriateness, one should consider the degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity and the need of an employer, required by law or regulation to follow merit principles, to have an objective system of selection. Obviously, this latter factor (requirement under civil service law to give some objective test) cannot by itself suffice as justification for a test which has, as here, substantial adverse impact on a racial group. While it can be said that no other available selection [device] with greater validity than the 10-C has been found, yet it must also be said—considering the minimal benefits resulting from the 10-C in the context of this employment situation—that no-test-at-all has 'substantially' the same practical validity as the 10-C." (A. 54; footnote omitted.)

On the basis of this single reference to the Justice Department Guidelines, petitioner argues that the district court "apparently" attempted to "balance the impact of the exam against its validity" and that to do so was error. (Pet. 17). We disagree with that equivocal reading of the district court's opinion. In our view, the court simply adverted once to racial impact in passing and found the test inappropriate for operational use on the

ground that it produced no appreciable increase in the performance of police officers—a finding amply supported in the record. The court of appeals shared that view. In response to petitioner's argument that the trial court balanced validity against racial impact, the court of appeals said:

> "The crucial finding of the district court, which was reached after careful and comprehensive consideration of all the facts and circumstances, is that the validation study showed that the police test is predictive of better job performance, but that the magnitude of the positive prediction is so low that the test is worthless for all practical purposes. We cannot conclude that this finding is clearly erroneous." (A. 14.)

The court of appeals did not say or even imply that the district court balanced racial impact against the magnitude of the correlation. It read the district court's opinion to find that the magnitude of the correlation, standing alone, "is so low that the test is worthless . . ." (*id.*).

In short, the court of appeals did not affirm the alleged balancing of racial impact against the magnitude of a statistical correlation, and so the question presented by petitioner as to the propriety of such balancing does not arise in this case.

B. Title VII Permits A Court To Assess The Racial Impact Of An Employment Practice When Considering Whether It Is Appropriate For Use.

Even if the district court had weighed the racial impact of the 10-C examination when considering whether it was of any practical use to the employer, that would have been permissible. Petitioner cites no decision of this Court or any court of appeals that has accepted its contention that Title VII requires a court to accept any statistical relationship, no matter how slight, between

test scores and a job performance criterion, without taking into account the racial impact of the test.

The Justice Department and Uniform Guidelines specifically authorize consideration of the racial impact of a test.[9] See p. 6 above. In like fashion, numerous decisions of the courts of appeals have taken into account the racial impact of employment practices when considering whether the practices are sufficiently job-related to meet the demands of Title VII.[10] As this Court noted in *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431, Title VII aims to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." That purpose would plainly be frustrated if, as the Board urges, an employment practice with the massive discriminatory impact here demonstrated could be justified by any mathematical correlation with any aspect of job performance, no matter

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[9] Petitioner suggests that the Justice Department Guidelines are not entitled to any deference because the Justice Department is an advocate, rather than an administrative agency with responsibilities in the area of employment discrimination. Pet. 17-18. This ignores the fact that the Justice Department Guidelines were developed and promulgated jointly by that department, the Department of Labor, and the Civil Service Commission. See 41 Fed. Reg. 51734-35 (1976). Moreover, the Uniform Guidelines, which were later adopted by all agencies with administrative jurisdiction over employment discrimination, are identical, in all material respects, to the Justice Department Guidelines.

[10] *E.g.*, *Green* v. *Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1297-98 (8th Cir. 1975); *Wallace* v. *Debron Corp.*, 494 F.2d 674 (8th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 244-45 (5th Cir. 1974); *United States* v. *Jacksonville Terminal System*, 451 F.2d 418, 451 (5th Cir. 1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798-800 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971).

how minimal the correlation or how massive the discrimination might be.[11] Accordingly, even if the district court balanced racial impact and validity and the court of appeals affirmed that determination, further review by this Court is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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[11] The Board attempts (Pet. 18-19) to buttress its argument on this point with a hypothetical example having no basis in the record. The calculations performed in this hypothetical depend on the assumption that the increased pool of applicants resulting from an affirmative action program is markedly less qualified than the previous pool of applicants. It is just as realistic to assume that the additional applicants resulting from affirmative action are, on the whole, approximately as well-qualified as previous applicants, but have been previously deterred from applying because of the employer's prior discriminatory practices.